Supreme Court of the United States

No. 911

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

BRUNO BLAZINA,

Petitioner,

vs.

E. P. BOUCHARD, District Director of Immigration and Naturalization Service, New Jersey,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on February 2nd, 1961.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is unreported and is printed in Appendix B hereto, *infra*. The opinion of the District Court is likewise printed in Appendix B hereto, *infra*.

Jurisdiction

The judgment of the Circuit Court of Appeals was filed on February 2nd, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Supreme Court Rule 19-1 (b).

Question Presented

The statutory provision involved is 8 U. S. C. A. 1253 (h). It is printed in Appendix A hereto, *infra*.

Statement

Briefly, the facts are these. The petitioner, Bruno Blazina, a 22 year-old Yugoslav national, entered the United States in August, 1957 as a non-immigrant seaman pursuant to Section 1282, Title 8, U. S. C. A. providing for conditional permits to land for a period not exceeding 29 days. On December 19, 1957, Blazina having remained in the United States for a longer period than authorized, the Immigration and Naturalization Service ordered him to appear on December 26, 1957 and show cause why he should not be deported. At this time Blazina was found deportable and was granted the right of voluntary departure subject to an alternative order that he was to be deported if he failed to depart within a specified time. Blazina did not leave the United States and the order of deportation became effective.

On January 27, 1958 Blazina applied to the Attorney General for a stay of deportation pursuant to Section 243 (h) of the Immigration and Nationality Act of 1952, 66 Stat. 212, as amended, 8 U. S. C. A. 1253 (h), asserting that if returned to Yugoslavia he would be "persecuted and prosecuted" because of his Roman Catholic faith, his belief in capitalism and in a democratic form of government, and his open disavowal of communistic ideology.

On November 26, 1958, a hearing in which Blazina was represented by counsel of his own choice was had on this application before a Special Inquiry Officer. At this hearing Blazina did contend that he would be subject to physical persecution if deported to Yugoslavia. In substance, he asserted three reasons why the Attorney General should

conclude that the Yugoslavian authorities would persecute him physically on his return. First, Blazina called attention to the fact of the communist government's general hostility toward religious beliefs and practice, and alleged that he was a practicing Roman Catholic who in good faith follows the tenets and precepts of his religion. When queried as to the precise sanctions he would be subjected to, Blazina testified that "[O]ne that works has complications" and that "those that go to church and worship over there are looked down upon." Second, he asserted that if deported he would "be jailed for about three months and then later on it would be very difficult * * * to acquire a position." When asked "Upon what basis would your imprisonment and further difficulty emanate from?", he replied, "Because I fled from Yugoslavia, and those who do that are punished." The record is sparse on this point but the most reasonable inference would seem to be that the three month prison term referred to would be punishment for desertion of his vessel. Third, Blazina testified to the effect that his very act of defecting, coupled with the anti-communist statements that he had made while in this country would in themselves cause his physical persecution on his return to Yugoslavia.

On the basis of the testimony just summarized the Special Inquiry Officer recommended that the application be denied, concluding that Blazina had failed to establish "by reasonable and probative evidence that he would be subjected to physical persecution if returned to Yugoslavia."

The suit at bar was filed by Blazina on September 25, 1959, seeking a "permanent injunction" restraining the District Director of the Immigration and Naturalization Service of New Jersey from deporting him to Yugoslavia. The United States District Court concluded that there was no sound basis in law or in fact for the Attorney General to refuse to grant Blazina the dispensation authorized by Section 243 (h) and on February 14, 1960 granted a per-

manent injunction restraining Blazina's deportation. The appeal of the District Director followed on April 4, 1960, and the case came on for argument in this court on October 6, 1960. Between the date of the taking of the appeal and the date of the argument Blazina who had volunteered for the draft, was inducted into the Armed Forces of the United States.

Blazina has asserted in the Circuit Court and it is not denied that after volunteering for the draft, he has been inducted into the Armed Forces of the United States. This added circumstance in Blazina's situation. In view of Blazina's induction into the Armed Forces of the United States the Circuit Court ordered their mandate stayed for a period of sixty days from the day of the filing of their opinion to permit Blazina to petition for certiorari or to file a new application under Section 243 (h) based on his induction into the Armed Forces of the United States, or to allow him to do both.

Reasons for Granting the Writ

1. Clearly, the question of physical persecution of the Petitioner, in a Communist country, upon his deportation thereto is both topical and important in the present state of the international situation. In *U. S. ex rel. Chen Ping Zee v. Shaugnessy*, D. C. S. D. N. Y., 107 F. Supp. 607 Judge DIMOCK said:

> "In the present state of affairs in the world it does not seem to me that a person's testimony that he would be subject to persecution in a Communist country can be dismissed so lightly * * * *"

In the *Chen Ping Zee* case, writs of habeas corpus were sustained and the Court went on to hold that there was no reason stated by the Government that would tend to show that the relators would not be subject to persecution. There is likewise no such proof in the case at Bar.

Settlement of this question is clearly in the public interest, especially wherein the petitioner not only swore in affidavits and testimony to be against communism, but also enlisted in the United States Army and is presently serving therein. The disregard of the latter fact of service is equivalent to a denial on whim or caprice. *Dabrowski v. Holland*, 259 F. 2d 449 (3 Cir., 1958).

Arguendo, a person deserting his ship to live in another country, living there, speaking against the country from whence he left, and enlisting in the new land's armed services which are philosophically diametrically opposite, will not find the original land turning the other cheek and welcoming him back with open arms. More likely the return will be accompanied by most severe physical, religious and economic persecution.

In a country like our own the ship jumping problem is a continuous and perennial one. There is a solid line of cases staying deportation from *U. S. v. Schlotfeldt*, D. C. Ill. (1938), 26 F. Supp. 283, a Jew to Nazi Czechoslovakia; the *Chen Ping Zee* case, *supra*, six Chinamen to Communist China; *Sang Ryp Park v. Barber*, 107 F. Supp. 605, a Korean to Korea; *Ex rel. Watts v. Shaughnessy*, U. S. D. C., S. D. N. Y., 107 F. Supp. 613, a Basque to Franco Spain; *U. S. v. Murff*, 253 F. 2d 941, a native of Yuoslavia to Communist Yugoslavia. The circumstances of the above cases have congruent counterparts in the instant case.

2. The decisions of the cases cited above show a conflict between the Circuits involved, in the Second Circuit in New York on the easterly side of the Hudson River, Judges DIMOCK, PALMIERI and CLARK speak out strongly in curtailing the actions of the Immigration and Naturalization Service, while on the westerly side of the Hudson River in New Jersey, the Third Circuit, just as often dissolve Orders staying deportations.

Added factors continually argued as essential to the instant case are the religious persecution and economic persecution aspects which the petitioner submits is nevertheless physical persecution. If he goes to jail because he is a deserting seaman, former Private in the U. S. Army, and a Catholic, it is submitted that all three elements will contribute to his punishment. And after his physical suffering, should he ever be released from jail, he will be deprived of earning a living in the only way he knows, that of a seaman, hence, will suffer further physical persecution from the pangs of hunger.

3. The decision of the court below is believed to be erroneous in that it disregarded the facts as they exist today, and could have taken judicial notice that Communist Yugoslavia would inexitably and undoubtedly punish the petitioner physically and in a severe manner, if for nothing else, the very fact that he voluntarily served in the U. S. Army. To cause the Petitioner to make further applications and engage in further litigation is to only bring about a multiplicity of suits and a circuity of actions effectuating the inevitable result that the petitioner should not be deported, otherwise he would be subject to severe physical persecution.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. CARLUCCIO,
Counsel for Petitioner.

Appendix A

Statute Involved

The Immigration and Nationality Act of 1952, Section 243(h), 8 U. S. C. A. §1253(h), is set forth as follows:

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

Appendix B

Order Dismissing Defendant's Motion for Summary Judgment and Entering Permanent Injunction

(Filed—February 11, 1960)

This cause came on to be heard before the Court on the application of the Plaintiff for a permanent injunction as prayed for in its complaint and the defendant's motion for summary judgment dismissing the complaint, and the Court having considered the complaint, the affidavits in support of the motion and in opposition to the motion, the briefs filed, the arguments of counsel and it appearing to the Court, after due deliberation that the plaintiff would be physically persecuted if deported to Yugoslavia by reason of his religious and political beliefs,

IT IS BY THE COURT this 11th day of February, 1960

ORDERED that the defendant's motion for summary judgment is hereby dismissed and it is further

ORDERED that the defendant, his agents, servants, employees and attorneys and all persons in active concert or participation with them be and each of them are hereby permanently enjoined, from deporting or attempting to deport the plaintiff or from molesting him pursuant to the deportation order heretofore issued by the Immigration and Naturalization Service in this matter, without costs. (TFM)

s/ THOMAS F. MEANEY,
U. S. D. J.

Appendix B

Opinion of the Court

(Filed—February 2, 1961)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,240

BRUNO BLAZINA

v.

E. P. BOUCHARD, District Director of Immigration and Naturalization Service, New Jersey,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 6, 1960.

Before BIGGS, *Chief Judge*, and HASTIE and FORMAN, *Circuit Judges*

By BIGGS, *Chief Judge*.

This is an appeal from an order of the United States District Court for the District of New Jersey permanently enjoining the District Director of the Immigration and Natur-

alization Service from deporting the appellee pursuant to a deportation order issued by the Service. Briefly, the facts are these. The plaintiff-appellee, Bruno Blazina, a 22 year old Yugoslav national, entered the United States in August, 1957 as a non immigrant seaman pursuant to Section 1282, Title 8, U.S.C.A. providing for conditional permits to land for a period not exceeding 29 days. On December 19, 1957, Blazina having remained in the United States for a longer period than authorized, the Immigration and Naturalization Service ordered him to appear on December 26, 1957 and show cause why he should not be deported. At this time Blazina was found deportable and was granted the right of voluntary departure subject to an alternative order that he was to be deported if he failed to depart within a specified time. Blazina did not leave the United States and the order of deportation became effective.

On January 27, 1958 Blazina applied to the Attorney General for a stay of deportation pursuant to Section 243(h) of the Immigration and Nationality Act of 1952, 66 Stat. 212, as amended, 8 U.S.C.A. §1253(h),[1] asserting that if returned to Yugoslavia he would be "persecuted and prosecuted" because of his Roman Catholic faith, his belief in capitalism and in a democratic form of government, and his open disavowal of communistic ideology. He did not allege that he was subject to "physical persecution" which is the only circumstance under which the Attorney General is authorized to withhold deportation under Section 243(h).

On November 26, 1958, a hearing in which Blazina was represented by counsel of his own choice was had on this application before a Special Inquiry Officer. At this hear-

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[1] Section 243(h) provides: "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

ing Blazina did contend that he would be subject to physical persecution if deported to Yugoslavia. In substance, he asserted three reasons why the Attorney General should conclude that the Yugoslavian authorities would persecute him physically on his return. First, Blazina called attention to the fact of the communist government's general hostility toward religious beliefs and practice, and alleged that he was a practicing Roman Catholic who in good faith follows the tenets and precepts of his religion. When queried as to the precise sanctions he would be subjected to, Blazina testified that "[O]ne that works has complications" and that "those that go to church and worship over there are looked down upon."[2] Second, he asserted that if deported

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[2] The testimony relevant to this contention was as follows:

"Q. With reference to your religious beliefs, would you state whether or not you are free to worship your faith in Yugoslavia?

"A. One that works has complications."

* * *

"Q. Do you have freedom of worship in Yugoslavia, generally?

"A. Only those who are not employed for the Government are allowed, and those who are working for the Government have no privilege and are not allowed."

* * *

"Q. Well, the question I ask you now—is there freedom of worship—could you worship freely in Yugoslavia whether you are a Catholic or any other denomination?

"A. I still maintain that those employed with the authorities have no privileges and others are permitted."

* * *

"Q. Compared to the freedom that you have here to worship, would you say that the same freedom applies in Yugoslavia to a person who is not employed by the Government?

"A. No, not the same, because those that go to church and worship over there are looked down upon.

"Q. Do you mean, would you say then that the Government looks with disfavor upon any religious beliefs in Yugoslavia?

"A. Yes, they do not recognize worship."

he would "be jailed for about three months and then later on it would be very difficult * * * to acquire a position." When asked "Upon what basis would your imprisonment and further difficulty emanate from?", he replied, "Because I fled from Yugoslavia, and those who do that are punished." The record is sparse on this point but the most reasonable inference would seem to be that the three months prison term referred to would be punishment for desertion of his vessel. Third, Blazina testified to the effect that his very act of defecting coupled with the anti-communist statements that he had made while in this country would in themselves cause his physical persecution on his return to Yugoslavia.[3] At no point did Blazina assert, however, that he had openly expressed any anti-communist sentiment while in Yugoslavia or on board ship or that he had engaged in any type of political activity tending to show

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[3] The testimony relevant to this contention was as follows:

"Q. Well, in what manner then do you insist that you would be persecuted if you were returned to Yugoslavia?

"A. Because I fled from there and I know that those who return are punished.

"Q. However, would you be punished because you fled or because you are opposed to the Yugoslav government?

"A. Because I do not care for the Communist party."

* * * *

"Q. Why would you be persecuted because you don't care for the Communist party, if as you have said you have never disclosed to anyone the fact that you do not care for it or are opposed to that party?

"A. The fact that I fled is proof enough that I did not care for the Communist regime.

"Q. So that the sole reason in essence that you have for believing that you would be persecuted is the fact that you fled and the possible indication that by reason of your having fled you have indicated disapproval of the Communist government of Yugoslavia. Is that right?

"A. Yes, that is correct."

opposition to the present Yugoslavian government or its political philosophy.[4]

On the basis of the testimony just summarized the Special Inquiry Officer recommended that the application be denied, concluding that Blazina had failed to establish "by reasonable and probative evidence that he would be subjected to physical persecution if returned to Yugoslavia." On December 31, 1958 the Regional Commissioner ordered that the application be denied stating that in his opinion Blazina would not be subject to physical persecution if deported.

The suit at bar was filed by Blazina on September 25, 1959, seeking a "permanent injunction" restraining the District Director of the Immigration and Naturalization Service of New Jersey from deporting him to Yugoslavia.

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[4] The testimony relevant to this point was as follows:

"Q. Have you ever spoken against the communist form of government or Yugoslav form of government to any group or any individual?

"A. No, I did not because I would fear exposure.

"Q. On board the ship when you came to the United States did you have any difficulty because of the fact that you are opposed to the Yugoslav form of government, or you indicated in some way that you are opposed to it?

"A. No, I did not because I feared then they wouldn't allow me abroad—to go ashore."

* * *

"Q. Have you ever been in any way politically active?

"A. We just spoke against the communistic regime to our friends in school but not openly.

"Q. You mean just among the intimacy of the people you trusted you might have commented against the communist regime; is that what you mean?

"A. Yes, that's correct.

"Q. Did you ever hold any political office of any kind or were you ever prominent in any way, politically?

"A. No."

Appendix B

It is alleged in the complaint that the action of the Attorney General in denying the relief sought by Blazina was arbitrary and capricious and that Blazina would be subject to physical persecution if deported to Yugoslavia. Affidavits were filed, the contents of which need not be detailed here. It is sufficient to state that they set out with sufficient clarity and correctly the events which preceded the filing of the suit. On October 9, 1959, upon the whole record of the proceedings had before the Special Inquiry Officer and the pleadings, the District Director moved for summary judgment under Rule 56(b), Fed. R. Civ. Proc., 28 U.S.C. The court below concluded that there was no sound basis in law or fact for the Attorney General to refuse to grant Blazina the dispensation authorized by Section 243(h) and on February 11, 1960 granted a permanent injunction restraining Blazina's deportation. The appeal of the District Director followed on April 4, 1960, and the case came on for argument in this court on October 6, 1960. Between the date of the taking of the appeal and the date of the argument Blazina who had volunteered for the draft, was inducted into the Armed Forces of the United States.

The District Director contends that the District Court erred in that it exercised independent judgment on a matter that was committed by Congress to the discretion of the Attorney General. We agree with this contention. The predecessor of Section 243(h) which was enacted in 1952, was Section 20 of the Immigration and Nationality Act of 1917, as amended, 64 Stat. 1010 (1950) which provided that "[N]o alien shall be deported * * * to any country in which the Attorney General shall find that such alien would be subjected to physical persecution." Section 243(h) vests in the Attorney General authority to withhold deportation if "in his opinion" the alien would be subjected to physical persecution. The 1952 changes are significant. They make clear that a decision whether an alien would be physically

persecuted on return to his native country was intended by Congress to be committed solely to the judgment of the Attorney General. See United States *ex rel.* Dolenz v. Shaughnessy, 206 F. 2d 392, 394 (2 Cir. 1953). This is not to say, of course, that an applicant has no rights under the statute. An applicant has a right to have his application considered. United States, *ex rel.* Dolenz v. Shaughnessy, *supra*, at p. 395, *cf.* Jay v. Boyd, 351 U.S. 345, 353 (1956). Moreover, such consideration must be given in conformity with the pertinent regulations promulgated by the Attorney General himself. *Cf.* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954). Procedural due process must be afforded the applicant at all times. United States *ex rel.* Leong Choy Moon v. Shaughnessy, 218 F. 2d 316, 318 (2 Cir. 1954). Moreover an application may not be denied arbitrarily or capriciously or for reasons that evince a complete disregard of the law and the facts. Cf. Dabrowski v. Holland, 259 F. 2d 449 (3 Cir. 1958) and McLeod v. Peterson, 283 F. 2d 180 (3 Cir. 1960).

Blazina does not contend that the Attorney General did not consider his application, that the regulations were not followed or conformed with,[3] or that he was denied procedural due process. Indeed, it appears that the appellee's application was given thoughtful consideration and that he had a full and fair hearing in which he was represented by counsel of his own choosing. The assertion is made, however, that the decisions of the Special Inquiry Officer and of the Regional Commissioner were arbitrary and capricious. We are of the view that these decisions were well within the terms of the statute and that the District Court, in substituting its judgment for that of the administrative officers, was clearly in error.

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[3] The regulations relating to stays of deportation are contained in 22 Fed. Reg. 9798-9 (1957), 8 C.F.R. §243.3(b).

Appendix B

Before the Attorney General may grant relief under Section 243(h) it must be shown to his satisfaction that, if deported, the alien would be subject not only to persecution, but to physical persecution. Blazina's testimony affords no basis for concluding that his religious beliefs would cause him to be subjected to such sanctions in Yugoslavia. At worst, it appears that he will be "looked down upon" and will encounter some "complications". That Blazina may suffer even these consequences at the hands of his government merely because of his religious practice and belief is deplorable. The repugnance of such a governmental policy to our own concepts of religious freedom cannot, however, justify our labelling such actions as "physical persecution".

Nor can the three-months prison sentence to which Blazina may be subjected as punishment for deserting his ship or his country illegally be termed physical persecution. The phrase "physical persecution" should be taken to mean confinement, torture or death inflicted on account of race, religion, or political viewpoint. Imprisonment for jumping ship does not come within this test, but seems rather to be a criminal sanction that is reconcilable with generally recognized concepts of justice.

Blazina's final contention is that the very fact of his desertion which itself indicates anti-communist feeling, and his anti-communist statements made since his arrival will be ground for his subjection to physical persecution if returned to Yugoslavia. This contention poses a question the resolution of which is well within the province of the Attorney General. There is no evidence that in deciding it the delegates of the Attorney General disregarded the pertinent facts or the standard contained in the statute. On almost identical facts which, if different at all, presented stronger indication of political activity by the applicant and a greater possibility of physical persecution, the Court of Appeals for the Second Circuit reached the

same result as we do here. See United States *ex rel.* Dolenz v. Shaughnessy, 200 F. 2d 288 (1952), *cert. denied*, 345 U. S. 928 (1953). See also United States *ex rel.* Miletic v. District Director of Immigration and Naturalization, 108 F. Supp. 719 (S.D.N.Y. 1952), and Obrenovic v. Pilliod, 282 F. 2d 874 (7 Cir. 1960). Blazina attempts to distinguish these cases on the ground that the question of religious persecution does not seem to have been raised in them, but as we have pointed out there is no basis for finding physical religious persecution in the present case.

Blazina has asserted in this court and it is not denied that after volunteering for the draft, he has been inducted into the Armed Forces of the United States. This added circumstance in Blazina's situation is one which was not and could not have been before the Attorney General. The court below and this tribunal are entitled to review that action of the Attorney General only on the basis of the record which was before him. Accordingly we cannot and do not discuss or deal with this aspect of the case. In view of Blazina's induction into the Armed Forces of the United States we will order our mandate stayed for a period of sixty days from the day of the filing of this opinion to permit Blazina to petition for certiorari or to file a new application under Section 243(h) based on his induction into the Armed Forces of the United States, or to allow him to do both.

Regrettably, we are compelled to comment on one other matter. The trial judge treated the Assistant United States Attorney who argued this case in the court below in an undeservedly harsh manner. It is important that judges be ever alert to their responsibility for upholding the dignity and prestige of our judicial system.

The judgment will be reversed. The court below will be directed to dismiss the complaint.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix C

Order on Mandate

(Filed—May 2, 1961)

This matter having been open to the Court by Chester A. Weidenburner, U. S. Attorney for the District of New Jersey (Raymond W. Young, Assistant appearing) in the presence of Carluccio and Carluccio, Esqs., Attorneys for the Plaintiff and it appearing that on February 11, 1960 an Order Dismissing the Defendant's Motion for Summary Judgment and Entering Permanent Injunction in favor of the Plaintiff and against the Defendant was filed;

AND IT FURTHER APPEARING that the Defendant appealed the said Order to the United States Court of Appeals for the Third Circuit;

AND IT FURTHER APPEARING that the United States Court of Appeals for the Third Circuit did on February 2, 1961 enter a Judgment reversing the Judgment of the District Court

AND IT FURTHER APPEARING that the mandate of the United States Court of Appeals for the Third Circuit has been filed with the Clerk of the United States District Court for the District of New Jersey and that pursuant to the said mandate and Order should be issued dismissing the Complaint of the Plaintiff now therefore

IT IS on this 2nd day of May, 1961; ORDERED that the Complaint is hereby dismissed.

THOMAS F. MEANEY
Judge, U.S.D.C.

Consent as to the form of the foregoing Order is hereby affixed;

ROBERT J. CARLUCCIO
for CARLUCCIO & CARLUCCIO
Attorneys for Plaintiff

FILED
MAY 29 1961
JAMES R. BROWNING, Clerk

No. 941

In the Supreme Court of the United States

OCTOBER TERM, 1960

BRUNO BLAZINA, PETITIONER

v.

E. P. BOUCHARD, District Director of Immigration and Naturalization Service, New Jersey

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 941

BRUNO BLAZINA, PETITIONER

v.

E. P. BOUCHARD, District Director of Immigration and Naturalization Service, New Jersey

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 9-17) is reported at 286 F. 2d 507. The order of the district court (Pet. 8) is not reported.

JURISDICTION

The judgment of the court of appeals was filed on February 2, 1961. The petition for a writ of certi-

orari was filed on May 3, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner, who is a deportable Yugoslav seaman, applied for a stay of deportation under Section 243 (h) of the Immigration and Nationality Act of 1952 on the ground of physical persecution. The Attorney General denied the application. The question presented is whether the court of appeals properly refused to overturn this refusal to grant discretionary relief.

STATUTE AND REGULATION INVOLVED

Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253, 66 Stat. 214, provides:

> (h) *Withholding of deportation*
>
> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

8 C.F.R. (1958 ed.) 243.3(b) provides:

> (b) *Stay of deportation*
>
> * * * *
>
> (2) If the request for a stay of deportation is predicated upon a claim by the alien that he would be subject to physical persecution if deported to the country designated by the Service, he shall be requested, upon notice, to appear

before a special inquiry officer for interrogation under oath. The alien may have present with him, at his own expense, during the interrogation any attorney or representative authorized to practice before the Service. The alien may submit any evidence in support of his claim which he believes should be considered by the special inquiry officer. Upon completion of the interrogation, the special inquiry officer shall prepare a written memorandum of his findings and a recommendation which shall be forwarded to the regional commissioner together with all the evidence and information submitted by the alien or which may be applicable to the case. The alien shall be served with a copy of the special inquiry officer's memorandum and recommendation and shall be allowed five days from date of service within which to submit written representations to the regional commissioner. If the alien refuses to appear for interrogation before a special inquiry officer when requested to do so or waives his appearance, all the pertinent evidence and available information in the case shall immediately be submitted to the regional commissioner. The decision whether to withhold deportation and, if so, for what period of time shall be finally made by the regional commissioner upon consideration of all the evidence submitted by the alien and any other pertinent evidence or available information.

* * * *

STATEMENT

Petitioner, a 23-year-old single male, is a native and citizen of Yugoslavia (R. 30a-31a). He entered the United States on August 19, 1957, as a non-immi-

grant seaman pursuant to 8 U.S.C. 1282, which provides for conditional permits to land for a period not exceeding 29 days. On December 19, 1957, after petitioner had remained in this country longer than permitted, he was ordered to appear and show cause why he should not be deported (R. 29a). Petitioner was found deportable and was granted the right of voluntary departure subject to the condition that he would be deported if he did not depart within the specified time (Pet. 10). Petitioner did not leave this country within the specified time and the order of deportation became effective (R. 29a).

On January 27, 1958, petitioner applied for a stay of deportation under Section 243(h) of the Immigration and Nationality Act, *supra*, p. 2, alleging that if returned to Yugoslavia he would be "persecuted and prosecuted" because of his Roman Catholic faith, his belief in capitalism, and his disagreement with the communistic principles in force in that country (Pet. 10).

On November 26, 1958, an inquiry was held before a special inquiry officer (see 8 C.F.R. 243.3(b)(2), *supra*, pp. 2-3). Petitioner appearing with counsel of his choice, testified that he was a Roman Catholic and that he faithfully followed the tenets and principles of that faith (R. 31a-32a); that in Yugoslavia one who is a Roman Catholic "has complications" in his work and is "looked down upon" (Pet. 10-11; R. 32a, 34a); that government employees do not have freedom of worship in Yugoslavia (R. 33a). He further testified that he did not believe in the type of government in force in Yugoslavia (R. 34a, 36a), and that if he

were returned to Yugoslavia he would be jailed for three months "[b]ecause [he] fled from Yugoslavia, and those who do that are punished" (R. 35a). Questioning by the special inquiry officer elicited that petitioner had not been politically active or openly anti-communist while in Yugoslavia (R. 37a-38a); that neither he nor his family were ever physically harmed in any way (R. 38a); and that the sole reason petitioner felt he would be persecuted was the fact that he had fled and that his flight communicated a disapproval of the Communist government in Yugoslavia (R. 36a).

On the basis of this testimony, the special inquiry officer determined that petitioner had not shown danger of physical persecution because of his religious or political views, and recommended denial of the application. On December 31, 1958, the Regional Commissioner ordered that the application be denied (Pet. 13).

On September 25, 1959, petitioner filed an action in the District Court for the District of New Jersey challenging the denial of his application as arbitrary and seeking an injunction against his deportation (R. 3a-5a). The district court held that petitioner came within the purview of Section 243(h) and granted the injunction restraining his deportation (R. 26a-27a). The court did not state that the Regional Commissioner had abused his discretion but rather that it saw the facts "in a different light" (R. 27a).[1] On

[1] The court stated: "You know it is a case where I told you once before even judges have been known to disagree. And I am not in disagreement with the judge who decided that case, but I simply see the facts in a different light" (R. 27a).

appeal, the judgment of the district court was reversed. The court of appeals held that the district court, "in substituting its judgment for that of the administrative officers, was clearly in error" (Pet. 15). As to petitioner's claim that his enlistment in the United States Army (which occurred while the appeal was pending) added a new factor, the court of appeals noted that this consideration manifestly had not been before the Attorney General and indicated that petitioner should be permitted to file a new application under Section 243(h) (Pet. 17). We are informed that such an application has been filed and is scheduled to be heard in June.

ARGUMENT

Petitioner has been adjudged a deportable alien and he does not deny the correctness of this administrative determination. In his action brought in the district court, he challenged only the refusal of the Attorney General to grant him relief under Section 243(h) of the Immigration and Nationality Act of 1952, *supra*, p. 2, on the ground that he would be subjected to physical persecution if he returned to Yugoslavia.

The proceeding under Section 243(h) is completely unrelated to the issue of the alien's right to remain in the United States. Instead, relief under Section 243(h) is a privilege to be granted a deportable alien when, in the "opinion" of the Attorney General, deportation would subject the alien to physical persecution. The legislative intent to grant in Section 243(h) the broadest possible discretion to the Attorney

General is apparent when that section is compared with its predecessor, Section 23 of the Internal Security Act of 1950, 64 Stat. 1010. That provision required withholding the deportation of any alien to a country which the Attorney General found would subject him to physical persecution. The present statute, instead of requiring that such an alien not be deported, states that "[t]he Attorney General is authorized to withhold deportation" when "in his opinion" physical persecution would be the result. In other words, the power to relax the deportation provisions on the ground of physical persecution is given to the Attorney General to be exercised by him according to his own best judgment. This judgment is necessarily based upon the knowledge he acquires through governmental channels as to political conditions in a particular country and by the particular facts of each individual case. *United States ex rel. Moon* v. *Shaughnessy*, 218 F. 2d 316 (C.A. 2); *United States ex rel. Dolenz* v. *Shaughnessy*, 200 F. 2d 288 (C.A. 2), certiorari denied, 345 U.S. 928; *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392 (C.A. 2).

In view of the broad discretion given by Section 243(h) to the Attorney General, the court of appeals properly held that the district court was not warranted in reversing the Regional Commissioner's decision because it saw the "facts in a different light" (R. 27a). While a court may examine a record to determine whether discretion has been abused, Congress has given it no power to substitute its own judgment for that of the Attorney General or his representative. *Chao-Ling Wang* v. *Pilliod*, 285 F. 2d 517, 519-

520 (C.A. 7); *Obrenovic* v. *Pilliod*, 282 F. 2d 874, 876 (C.A. 7); *United States ex rel. Cantisani* v. *Holton*, 248 F. 2d 737, 738-739 (C.A. 7), certiorari denied, 356 U.S. 932; *United States ex rel. Dolenz* v. *Shaughnessy*, *supra*, 200 F. 2d at 291; *Sunjka* v. *Esperdy*, 182 F. Supp. 599, 601 (S.D. N.Y.); affirmed, April 13, 1960 (C.A. 2), certiorari denied *sub nom. Roncevich* v. *Esperdy*, 364 U.S. 815.

The record here supports the Attorney General's determination that petitioner had not established a sufficient basis for his claim that he would be subject to physical persecution if he returned to Yugoslavia. Petitioner's evidence, viewed in the light most favorable to him, shows only that he, as a Roman Catholic, would be "looked down upon" and have "complications" in his work (R. 32a, 34a). Moreover, the fact that he was neither politically active nor a lay leader in his religion militates against his claim of danger of physical persecution. *Batistic* v. *Pilliod*, 286 F. 2d 268, 269 (C.A. 7), petition for a writ of certiorari pending, No. 894, this Term; *Lardas* v. *Holland*, 235 F. 2d 955, 957 (C.A. 3); see *United States ex rel. Miletic* v. *District Director*, 108 F. Supp. 719, 720 (S.D. N.Y.). Petitioner alleged that if returned to Yugoslavia he will face a three-months prison sentence. This sentence, however, would be based not on his religious or political beliefs, but on the fact that he deserted his ship (R. 35a). Punishment for the crime of desertion is not the physical persecution contemplated in Section 243(h) of the Immigration and Nationality Act. *United States ex rel. Miletic* v. *District Director*, *supra*, 108 F. Supp. at 720.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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